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Supreme Court of the United States

October Term, 1955

No. 189

GEORGE WASHINGTON PIERCE,
PETITIONER,

v.

HEWLETT-PACKARD COMPANY and PAUL G. YEWELL, doing business as YEWELL ASSOCIATES, RESPONDENTS.

SUPPLEMENT TO PETITIONER'S REPLY BRIEF

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The petitioner would invite this Court's attention to several developments subsequent to the preparation of the Petitioner's Reply Brief.

A.

On page 3 of that Reply Brief, in connection with the question as to the proper construction of the new Patent Act, reference was made to a decision by Judge Learned Hand, dated June 20, 1955, construing the new Patent Act liberally. Whether Judge Hand was correct in that liberal construction is now presented to this Court by Question 1, page 3, of a recently filed Petition For A Writ of Certiorari, *Bausch & Lomb Optical Co.* v. *Dean A. Lyon.*

B.

On page 20 of the petitioner's Petition For A Writ of Certiorari, reference was made to a number of additional decisions further illustrating the struggles of the various Courts of Appeals to arrive at a correct understanding of the meaning of Rule 54(b) of the Federal Rules of Civil Procedure. The Federal Reporter of September 12, 1955, contains a decision of the Court of Appeals for the Second Circuit, *Rieser* v. *The Baltimore and Ohio Railroad Company*, 2 Cir., 1955, 224 F. 2d 198, in which Judge Clark, at page 204, holds that *Flegenheimer* v. *General Mills*, 2 Cir., 191 F. 2d 237, previously decided by a different panel of the same Court of Appeals for the Second Circuit, "cannot be taken as the present law of this Circuit", and Judge Frank, pages 205-206, though "reluctantly" concurring, protests nevertheless that "I still think correct the views there expressed" in the *Flegenheimer* decision, which were "carefully thought out", and "where the opinion was by our wisest and most experienced living judge, Learned Hand".

Though other jurisdictions have not since been heard from, the *Flegenheimer* decision is still regarded as good law in at least the District of Columbia, *Capital Transit Co.* v. *District of Columbia*, 21 Fed. Rules. Serv. 54b.4, Case 7.

The present case will not necessarily be governed by what this Court may decide in *Sears, Roebuck and Co.* v. *Mackey*, No. 34, October Term, 1955. In the present case, part only of the single unitary "claim" (or cause of action) has been adjudicated: several claims only of a number of claims in suit of the same patent have been held invalid, and it will be necessary later to adjudicate further the remaining claims, with additional appeals from such

further adjudication. In the words of Judge Clark, however, page 199, "* * * an entire claim must be adjudicated and appeals cannot be taken from an order upon a part of a single claim." See also *United States* v. *Florian*, 312 U. S. 656, *Leonard* v. *Socony-Vacuum Oil Co.*, 7 Cir., 1942, 130 F. 2d 535, 536, *Munson Lime, Inc.* v. *Green*, 2 Cir., 1948, 165 F. 2d 321 and *ex parte National Enameling and Stamping Company, Petitioner*, 201 U. S. 156, 160.

This same issue is raised in another Petition For A Writ of Certiorari, *Pierce* v. *American Communications Company, Inc.*, No. 295, October Term, 1955.

Respectfully submitted,

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